UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA OFFICE

ROY SPA, LLC

and **CASE 19–CA–083329**

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 2

Ryan Connolly, Esq., for the Acting General Counsel.
Michael Avakian, Esq., for the Respondent.
Timothy J. McKittrick, Esq., for the Charging Party.

SUPPLEMENTAL DECISION AND ORDER

STATEMENT OF THE CASE

MICHAEL A. MARCIONESE, Administrative Law Judge. This is a Supplemental Decision and Order concerning the Respondent's (Roy Spa, LLC) application for an award of attorney's fees and expenses pursuant to the Equal Access to Justice Act (EAJA), 4 U.S.C. § 504 and Section 102.143 of the Rules and Regulations of the National Labor Relations Board (the Board). Because I find that the General Counsel was substantially justified in litigating this case, I deny the Respondent's application.

On October 31, 2012, the Regional Director for Region 19 of the Board, acting on behalf of the Acting General Counsel, initiated the litigation in this matter by issuing a complaint and notice of hearing alleging that the Respondent violated Section 8(a)(1) and (5) of the Act. The complaint was subsequently amended at the hearing. On November 14, 2012, the Respondent filed its answer to the complaint denying, inter alia, that the Board had jurisdiction over the Respondent.

On February 20 and 21, 2013, I presided over a hearing in this matter. At the opening of the hearing, the Respondent moved to bifurcate the proceeding so that a hearing on the jurisdictional issue would be conducted first to be followed by a hearing on the substantive allegations of the complaint only after it was determined that the Board had jurisdiction over the Respondent. I denied this motion on the record.

On June 28, 2013, I issued a decision which found that the Respondent did not meet either the Board's discretionary jurisdictional standards or the national defense standard for. asserting jurisdiction. As a result, I dismissed the complaint in its entirety. On August 13, 2013, no exceptions having been filed, the Board issued an order adopting the findings and conclusions of my decision and dismissing the complaint.

On September 12, 2013, the Responded filed its EAJA application along with a memorandum in support of the application and affidavits. On November 5, 2013, the Board issued an order referring the matter to me for decision. On December 20, 2013, pursuant to Section 102.150, counsel for the Acting General Counsel filed a motion to dismiss the Respondent's application. On December 27, 2013, I issued an order to show cause why the General Counsel's motion should not be granted and on January 17, 2014, the Respondent filed its response to the show cause order.

In its application, the Respondent asserts that it is the prevailing party in an adversary adjudication before the Board, that it had a net worth less than $7 million and employed less than 500 employees, that the General Counsel was not substantially justified in pursuing the matter, and that it incurred $64,956.25 in attorney's fees[1] and $3,320.65in expenses in defending itself against the complaint. Counsel for the Acting General Counsel, in his motion to dismiss, did not address whether the Respondent was a "prevailing party" and whether the enhanced attorney's fees were justified and compensable. Instead, counsel relied solely on its position that the Acting General Counsel was justified in litigating this case.

Under the statute and the Board's Rules and Regulations, Section 102.144, the General Counsel has the burden of proving that an award of fees should not be made to an eligible applicant. The General Counsel may meet this burden with a showing that its position in the litigation was "substantially justified." The Supreme Court, in *Pierce v. Underwood,* 487 U.S. 552 (1988), held that "substantially justified" means "justified to a degree that could satisfy a reasonable person", or "if it has a reasonable basis both in law and fact." The government is "substantially justified" where the evidence is "what a reasonable mind might accept as adequate to support a conclusion", i.e. where "reasonable people could differ" on whether the allegation should be litigated. Id. at 563-566. The Board applies this standard, as explained in *Galloway School Lines,* 315 NLRB 473 (1994):

> The Board has stated that substantial justification does not mean substantial probability of prevailing on the merits, and that it is not intended to deter the agency from bringing forward close questions or new theories of law. The Supreme Court has defined the phrase "substantial justification" under EAJA as "justified to a degree that could satisfy a reasonable person" or having a "reasonable basis in law and fact." [citation omitted]. Thus, in weighing the unique circumstances of each case, a standard of reasonableness will apply.

[1] The Respondent also seeks enhanced attorney's fees, at the rate of $475/hour, due to the specialized nature of the case.

315 NLRB at 473. See also *Meaden Screw Products Co.,* 336 NLRB 298 (2001); *Jansen Distributing Co.,* 291 NLRB 801, fn. 2 (1988). Accord: *Golden Stevedoring Co.,* 343 NLRB 115 (2004); *Glesby Wholesale, Inc.,* 340 NLRB 1059 (2003).

The complaint in the instant case alleged that the Respondent was a successor employer with respect to the operation of a barber shop on the premises of Malmstrom Air Force Base in Great Falls, Montana, that it had an obligation to recognize and bargain with the Charging Party, which had represented the employees at the barber shop for a number of years, and that it had unilaterally changed the employees terms and conditions of employment after taking over the barber shop in 2011. The General Counsel alleged jurisdiction under the Board's national defense standard. As noted, the Respondent took the position from the beginning that it was not an employer engaged in commerce within the meaning of the Act.

The evidence presented at the hearing showed that, although the Respondent was based in Virginia and operated hair care facilities at military installations in Arizona, Texas, Florida and Massachusetts, it's gross revenues for calendar year 2011, the year in which it acquired the contract at Malmstrom, did not exceed $500,000. The General Counsel essentially conceded this point, relying instead on the national defense standard as a basis for asserting jurisdiction over the Respondent's operations at Malmstrom.

In making my decision to dismiss the complaint, I noted that the Respondent met the *statutory* definition of an employer engaged in commerce because it operated in several states in addition to its home state of Virginia. I found, based on the parties' stipulation, that the Respondent did not satisfy the *discretionary* retail standard, i.e. gross revenue in excess of $500,000, for the assertion of jurisdiction over a barber shop. *O K Barber Shop,* 187 NLRB 823 (1971). In discussing the Board's national defense standard, I noted that the Board had historically applied that standard to assert jurisdiction over barber shops on military bases that were similar to Respondent's operation. See *Spruce Up Corporation,* 181 NLRB 721 (1970) and *Gino Morena Enterprises,* 181 NLRB 808 (1970). Although the evidence in those cases showed that the employers also satisfied the Board's discretionary standards, it was the national defense standard that was cited by the Board as a basis for jurisdiction. In my decision, I also discussed that, in more recent cases, the Board had declined jurisdiction over hair care facilities under the national defense standard where the facts were distinguishable from the older cases. See *Fort Houston Beauty Shop,* 270 NLRB 1006 (1984) and *Pentagon Barber Shop,* 255 NLRB 1248 (1981). The Board did not overrule the older cases. Before reaching my conclusion that the national defense standard was not sufficient on the facts here to assert jurisdiction, I expressly stated that this case fell between the two lines of cases cited above. The latter cases were sufficiently distinguishable from the facts here that they did not compel dismissal of the complaint just as the facts of the older cases were sufficiently distinguishable that they did not compel the assertion of jurisdiction. Because the Board had never addressed the exact factual situation here, "reasonable minds" could differ as to whether the Respondent's operations were closer to the facts of *Spruce Up* and *Gino Morena* than *Ft. Houston* and *Pentagon*. See *University of New Haven,* 279 NLRB 294, 295 (1986) (finding substantial justification where precedent was not so factually identical as to be "conclusive" of a particular issue). *Welter v. Sullivan,* 941 F.2d 674, 676 (8th Cir. 1991) (the government will be found to be substantially justified where "at least one permissible view of the evidence

shows a reasonable basis in law and fact" and "closeness itself is evidence of substantial justification.").

The Courts and the Board have held that EAJA was never intended to "stifle the reasonable regulatory efforts of federal agencies," or to deter the government from "advancing in good faith a close question of law or fact." *Wyandotte Savings Bank v. NLRB,* 682 F.2d 119, 120 (6th Cir.1982); *Shellmaker, Inc.,* 267 NLRB 20, 21. See also *Abell Engineering & Manufacturing, Inc.,* 340 NLRB 133 (2003); *Galloway School Lines,* supra at 473. Here the question of jurisdiction was close and could have gone either way. Under these circumstances, the General Counsel was substantially justified in issuing the complaint and litigating the issue of jurisdiction rather than dismissing the unfair labor practice charge and leaving the Charging Party and the employees it represented with no remedy for a potential violation of the act.

Having found that the General Counsel was substantially justified in litigating this matter, I shall grant the Acting General Counsel's motion to dismiss the Respondent's application for an award of fees and expenses under EAJA.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent's Application for an Award of Fees and Expenses pursuant to the Equal Access to Justice Act is dismissed.

Dated, Washington, D.C. February 28, 2014

Michael A. Marcionese
Administrative Law Judge

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.